

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Claimant suffered an accident while working for respondent in July 2003. As a result of that accident, claimant injured his low back and right leg. Since his July 2003 accidental injury, claimant has undergone knee surgery, physical therapy, epidural injections in his back, and back surgery.

In February 2004, a preliminary hearing was held in this claim concerning claimant's requests for medical benefits and temporary total disability benefits. The Judge granted claimant's requests in a February 26, 2004 preliminary hearing Order. Among other things, treatment was authorized with Dr. Lawrence Will and Dr. John P. Gorecki. And temporary total disability benefits were granted commencing July 16, 2003.

In early October 2004, claimant helped build a storage shed on his property. Three others, two of whom testified at the February 2005 preliminary hearing, assisted claimant with constructing the shed.

Claimant testified at the February 2005 preliminary hearing that the activities he performed while building the shed, which included shingling and using a nail gun, were within the restrictions he received from his treating physician, Dr. Gorecki. Those restrictions were to not lift more than 25 pounds, limited standing or sitting in one position, and limited stooping and squatting. Moreover, claimant testified the most time he spent working on the shed was two hours per day.

Claimant also testified he did not have any increase in his low back pain after building the shed. Instead, claimant attributed his increased low back pain in the fall of 2004 to discontinuing pain medications. Claimant had discontinued using prescription and over-the-counter pain medications because he could not tolerate them and because of news reports concerning alleged ill effects from such medications.

Chris Frye helped claimant build the shed on claimant's property. Mr. Frye testified he did not observe claimant lift anything over 25 pounds, stand or sit in one position for very long, or repetitively squat or stoop. Doug Kinyon, who also helped claimant build the shed, indicated he did not observe claimant perform activities that would violate the restrictions mentioned above.

At the February 2005 preliminary hearing, claimant requested medical benefits and temporary total disability benefits, which respondent and its insurance carrier had stopped providing.

Medical records from both parties were entered into the record at the February 2005 preliminary hearing. According to Dr. Gorecki's office notes from claimant's July 27, 2004 visit, which was more than two months after claimant's May 13, 2004 back surgery, the doctor felt claimant was doing reasonably well and recommended continued physical therapy and current management. Although the doctor stated that claimant was doing much better than on the previous visit, he also noted that claimant had some residual back pain.

When Dr. Gorecki saw claimant on November 2, 2004, office notes from that visit reflect that claimant was slow to recover from his May 2004 back surgery. The doctor noted claimant was eventually doing well, then built a small storage shed and developed some modest, constant, spontaneous low back pain that was improving with physical therapy. Dr. Gorecki concluded claimant had mechanical back pain in the setting of a prior microdiscectomy. Although an MRI would be considered if claimant's symptoms did not resolve, the doctor thought claimant was doing relatively well at the November 2, 2004 visit.

Claimant called Dr. Gorecki's office on January 3, 2005, and reported he continued to have back pain. The notes from that phone call state an MRI would be scheduled for claimant.

Dr. Gorecki wrote respondent's insurance carrier on December 19, 2004. In that letter, Dr. Gorecki stated it was difficult, if not impossible, to assign whether or not building the shed was an intervening event. According to Dr. Gorecki, building the shed may have exacerbated claimant's symptoms. However, Dr. Gorecki stated that the symptoms related to the pathology in claimant's back and that it was not unusual for patients to have protracted symptoms following back surgery.

A facsimile between the insurance carrier and Dr. Gorecki was entered into evidence at the February 2005 preliminary hearing. The facsimile appears to have been signed by the doctor under a handwritten "Yes" in answer to a question asked of the doctor, that being if it was correct that claimant's symptoms had stabilized, then increased and resulted in increased treatment following the building of the shed. However, the doctor was not asked and did not state that building the shed had caused a new injury to claimant or that claimant's symptoms were the direct result of such injury.

Twice, Judge Barnes has observed claimant testify and has determined claimant is credible. Likewise, at the February 2005 hearing, the Judge observed claimant's two witnesses testify and also found them to be credible. The Board also finds claimant's testimony credible. After reviewing the record compiled to date, the Board concludes claimant's present symptoms and need for additional medical treatment are more probably than not the result of his July 2003 work-related accident and not due to an alleged

intervening injury. Consequently, the February 23, 2005 preliminary hearing Order should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.¹

WHEREFORE, the Board affirms the February 23, 2005 preliminary hearing Order entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of April 2005.

BOARD MEMBER

c: Christopher Randall, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹ K.S.A. 44-534a(a)(2).